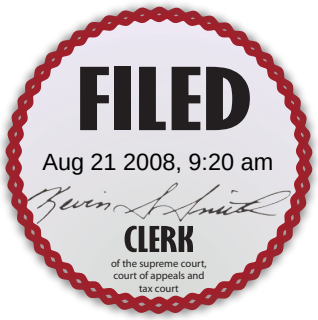

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IN THE COURT OF APPEALS OF INDIANA

PAUL HARRIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A02-0802-CR-112
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Thomas G. Wright, Judge
Cause No. 27D02-9912-CF-97

August 21, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Paul E. Harris, Jr., appeals his eighty-year sentence for five counts of Class A

felony child molesting.[1] The trial court did not abuse its discretion in finding his criminal history was a significant aggravating circumstance, and we affirm.

FACTS AND PROCEDURAL HISTORY

In the late fall of 1999, Harris' five-year-old step-daughter was living with him. On at least five occasions, Harris placed his penis in his step-daughter's mouth and she performed fellatio until he ejaculated.[2] When confronted by police, Harris asserted: "[T]he five year old was the aggressor. That she would wake him up, and come into the room, and start performing oral sex on him, and he didn't know how to make her stop, so he would let her finish until she was done." (Tr. at 13.)

The State charged Harris with five counts of Class A felony child molesting. Harris pled guilty to all five counts in exchange for an 80-year sentence cap. The court found Harris' criminal history an aggravating circumstance justifying a fifty-year sentence[3] for one count of child molesting, and ordered that 50 years served consecutive to four concurrent thirty-year sentences for the other four counts, for a cumulative sentence of eighty years.

DISCUSSION AND DECISION

Harris claims his criminal history is insufficient to justify a 20-year enhancement of one of his sentences. Because Harris was sentenced on October 26, 2000, we apply the sentencing laws as they existed at the time of his crime. *See Smith v. State*, 889

[1] Ind. Code § 35-42-4-3(a)(1).

[2] Harris has not provided a transcript of the guilty plea hearing, and thus we are unable to reiterate the factual basis provided for the pleas.

[3] In 2000, the pertinent sentencing statute provided: "A person who commits a Class A felony shall be imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances . . . ." Ind. Code § 35-50-2-4 (2004).

N.E.2d 261, 262 n.2 (Ind. 2008) ("We apply the version of the sentencing statute in effect at the time of Smith's crimes (pre-April 25, 2005) and thus refer to his 'presumptive' sentence, rather than his 'advisory' sentence."). At that time, sentencing decisions were "within the trial court's discretion and [were] governed by Indiana Code § 35-38-1-7.1." *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002). Trial court decisions to enhance a sentence or to run sentences consecutively were reviewed only for an abuse of discretion. *Id*.

Before a trial court could impose enhanced or consecutive sentences, it needed to: "(1) identify the significant aggravating factors and mitigating factors; (2) relate the specific facts and reasons that the court found those aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators." *Veal v. State*, 784 N.E.2d 490, 494 (Ind. 2003). A single aggravating circumstance could justify both enhanced and consecutive sentences. *Id*. Criminal history was a proper aggravating factor. *Johnson v. State*, 725 N.E.2d 864, 868 (Ind. 2000).

Harris argues the court abused its discretion when finding his criminal history a significant aggravating circumstance because "an unrelated conviction for Failure to Prove Financial Responsibility seven years before this incident combined with a misdemeanor Batter[y] conviction over twelve years old" are insufficient to justify his enhanced sentence. (Appellant's Br. at 4.)

We might have agreed with Harris but for the additional information the record contains regarding that twelve-year-old battery conviction. The Pre-sentence Investigation Report, which Harris confirmed at the sentencing hearing was correct,

provides:

> The defendant stated during the interview that the Battery offense in 1987 was more like a fondling. The defendant stated that Judge John Porter suggested that the defendant seek help with Ed Pereira. The defendant stated that he did speak with Ed.

(App. at 28.)[4] At sentencing, the trial court said:

> However, we do find a little bit of, uh, of the (inaudible) in there in the '87 Battery, is, uh, and to the defendant's credit indicates that there was a similar type of offense as it relates to that particular victim in that battery charge, and uh, the defendant did, uh, take the Judge's suggestion and seek help. So that tells the Court that, that something more than this one occasion with this one child has been a problem in this defendant's life, some thirteen years ago, fourteen, twelve years ago. And as the defendant and the State have agreed to a cap in this particular case, the Court is going to adhere to that cap, even though, if left to my discretion, I would, uh, most certainly enter more than eighty years on this particular facts and circumstances.

(Tr. at 24-5.) Because Harris had been previously prosecuted for fondling a child and because he had not benefited from the assistance he received to prevent future improper sexual activity, we cannot say the trial court abused its discretion in finding his criminal history sufficient to justify a twenty-year enhancement of one sentence for Class A felony child molesting. *See, e.g.*, *Smith*, 889 N.E.2d at 263 (finding no abuse of discretion where trial court used prior conviction of Class D child molesting to justify four consecutive 30-year sentences for four counts of Class A felony child molesting).[5]

Affirmed.

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[4] Harris' counsel included an un-redacted copy of Harris' pre-sentence investigation report in the Appendix on white paper. We remind counsel that confidential documents are to be filed separately on green paper. *See* Ind. Appellate Rule 9.

[5] Although Harris' statement of relevant law notes we have authority to review and revise sentences if they are inappropriate in light of a defendant's character and the nature of his offense, he provides no argument regarding his character or the nature of his offense. Accordingly, we do not address the appropriateness of his sentence.

NAJAM, J., and ROBB, J., concur.